

ANNUAL HEARING

Before
The Joint Judiciary Committee
Of The Colorado General Assembly



APPEARING ON BEHALF OF THE AGENCY:

DOUGLAS K. WILSON
COLORADO STATE PUBLIC DEFENDER

KAREN PORTER
Chief Financial Officer

Wednesday, December 11, 2013

Hearing Agenda

2:45 – 4:00 PM Office of the State Public Defender

1. Introductions

2. Opening Comments

- Introductory remarks about the creation of the modern Office of the State Public Defender in 1970
- Our role under the United States and Colorado Constitutions
- Our overall mission and goals

3. Discussion of the most significant programmatic and budget priority for the upcoming year

- Appellate caseload and backlog issues.

4. Discussion of other long-term programmatic and budget issues of the OSPD

- Caseload

5. Discussion of proposals for legislation that may affect the OSPD's program operations and resource requirements

- Legislation coming out of the Juvenile Defense Attorney Interim Committee that was directed by HJR 13-1019, such as:
 - Providing social workers to assist in defending juvenile defendants.
 - Providing defense counsel for juveniles at intake, at state expense. At state expense is a topic we expect to be discussed further as there were concerns about the State providing counsel to juveniles with parents who had the ability to pay as well as concerns about taking the parent out of the decision making process with regards to the child's representation throughout the court proceedings.
 - Legislation is possible this session that would shift the associated costs from Judicial to the OSPD for representation of juveniles in delinquency cases in which (1) the parent or legal guardian refuses to retain counsel for the juvenile, or (2) the court finds such representation is necessary to protect the interest of the juvenile or other parties involved in the case. When such an appointment is

necessary and the juvenile does not qualify for representation by the Public Defender or the Office of Alternate Defense Counsel, the Judicial Department will pay for the costs of counsel and investigator services.

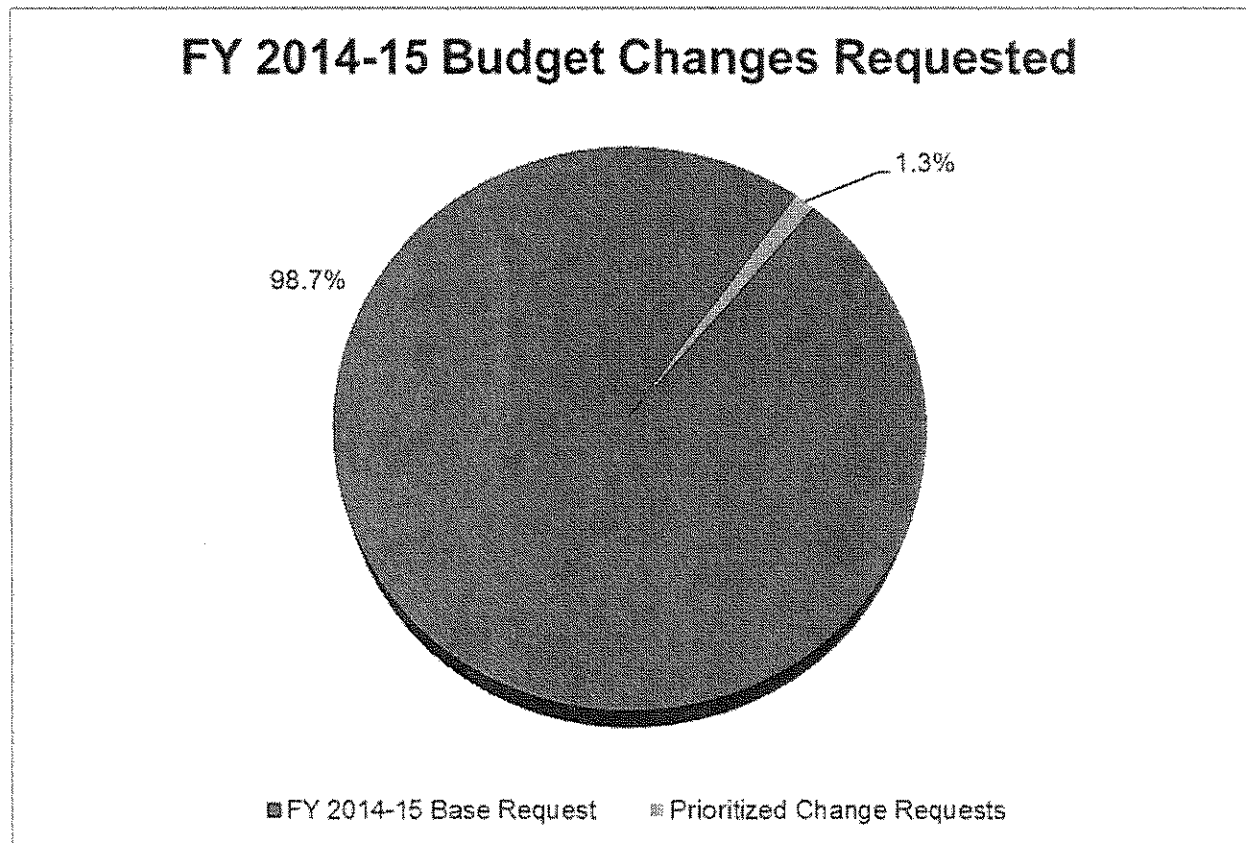
- These costs are currently paid on an hourly basis by Judicial. It is assumed that this workload, and therefore the costs, would be covered by OSPD staff.
 - It is unclear if the practice of requesting reimbursement for these costs would continue.
- The Discovery Task Force that arose out of SB13-246 was charged with addressing the issue of discovery costs in criminal cases. Their report states that they have developed proposals for an eDiscovery system in Colorado. It is our understanding that this delivery system would allow the District Attorney to process reports and make them available for defense of the indigent clients of the OSPD and the Alternate Defense Counsel at no cost. However, due to recent privatization of the blood and breath testing that was previously conducted by the Colorado Department of Public Health and Environment, there will be increased costs related to this testing for both the prosecution and for the defense – not covered by this task force.
- The Judicial Department (via JUD R2) is requesting 8.0 FTE in Judges and support staff in FY15 (2.0 FTE for Judges and 6.0 FTE for support staff) for the 18th judicial district.

BUDGET REQUEST SUMMARY

FY 2014-15 BUDGET REQUEST

The total FY 2014-15 budget request for the Office of the State Public Defender (OSPD) is \$ 82,592,724 and 759.7 FTE . This change represents an increase of 10.6 % when compared to the FY 2013-14 appropriation of \$ 74,701,240. The total of our prioritized Change Requests is \$ 1,023,287, which represents a 1.3 % increase to the FY 2014-15 Base Request.

- **FY 2013-14 appropriation of \$ 74,701,240**
PLUS annualizations and common policy items of \$ 6,868,197
- **FY 2014-15 base request of \$ 81,569,437**
PLUS Change Request #R-1 for Appellate Staffing for \$ 995,045
PLUS Change Request #R-2 for Attorney Registration Fees for \$ 28,242
- **FY 2014-15 Budget Request of \$ 82,592,724**



Our FY2014-15 budget continues to address the changing needs of the population served by the OSPD. Our primary budget change request this year focuses on our rapidly increasing backlog of cases in the Appellate Division. Without these additional resources, it is expected that our Office will be unable to achieve its constitutional mandate of providing effective criminal defense counsel to all indigent persons requesting counsel. We are also requesting a second budget change request, which will accommodate the increase in the attorney registration rates.

PRIORITY FOR THE CURRENT FISCAL YEAR

The OSPD's Number One Priority - APPELLATE STAFFING

Request Summary

The Office of the State Public Defender (the Office) is requesting 14.7 FTE and \$995,045 General Fund spending authority for FY 2014-15, annualized to 16.0 FTE and \$1,019,286 for FY 2015-16 for its Appellate Division to address staffing and funding requirements necessary to reduce the rapidly expanding appellate "backlog," the impact of additional staff received by the Attorney General, and to streamline the appellate process for all appeals.

These additional resources will provide eight attorney FTE to substantially reduce the current case backlog over the next five years, to adequately staff the annual increase currently experienced in its backlog, and to reduce its standard caseload to a manageable level. An additional two attorney FTE will allow the Office to centralize all appeals within the Division, and one attorney FTE will address the impact of the AG attorney staff increase. These 11 attorney positions will require 5.0 FTE in paralegal and administrative staff support.

It is not the intent of this decision item to request resources to fully staff the Division, yet rather to address the most serious issues identified above which will allow for the filing of Opening Briefs within the established and acceptable deadlines. After the Opening Brief is filed, additional work is required on the case so it remains active as it progresses through the appellate process. The Division estimates there are just under 1,500 cases at various stages within this process and the work involved extends well into subsequent years. The agency has recently started collecting additional data relating to these processes, to better track all cases, to define the associated workload impact, and to determine the resources required to bring all cases to their final dispositions. Once sufficient data becomes available, further analysis and reporting can be provided.

Appellate Division Overview

The mandate of the Office is to provide effective criminal defense counsel to all indigent persons requesting counsel, in both the trial and appellate courts. To address this need in the appellate courts, the Public Defender maintains a centralized Appellate Division. The Division represents indigent criminal defendants in appeals of felony convictions from every jurisdiction throughout the state.

The appellate process is initiated by entry in the district court docket of a final order or judgment subject to appeal, and an order finding the defendant indigent ("in forma pauperis") and appointing the Office for purposes of appeal. Following the final order or judgment, an appellate packet is prepared by the trial office and forwarded to the Division. The Division then files the Notice of Appeal and Designation of Record. Once the record on appeal is complete and forwarded to the Court of Appeals, the Court sets the due date for the Opening Brief.

The preparation of an Opening Brief is generally the most time-intensive aspect of the appellate process for the attorney handling the appeal. It is not unusual for the initial district court record filed with the Court of Appeals to be incomplete. Division attorneys often must spend time getting additional materials from the district court made part of the record and, in some instances, must litigate issues related to the appellate record in district court. When the appellate record is complete, the attorney must review the entire record in order to identify, research, and evaluate all potential appellate issues, ultimately identify the specific issues to be raised to the appellate court, and then write the Opening Brief. The time required for this step in the appellate process has increased significantly over time, and is directly related to the length and complexity of the record. In FY 1999-2000, the average record size per case was approximately 650-700 pages. In calendar year 2012 the office experienced an average of 1,200 pages and thus far in 2013 the average has increased to 1,300 pages. The size of the average appellate record has almost doubled since 1999. Factors contributing to this increase include:

- Length of Trials. The average length of trials has cumulatively increased 22.4 percent from 2000 to 2012. Longer trials translate directly into more pages of transcripts for the Division to review in order to write the Opening Brief. Longer trials also generally give rise to more potential appellate issues for the attorney to research and evaluate, even if those issues are ultimately not raised in the appellate brief.
- The Colorado Sex Offender Lifetime Supervision Act of 1998, providing for indeterminate lifetime sentences for sexual assaults, has contributed to more and longer trials, particularly in child sexual assault cases. Few accused criminal defendants will plead guilty to an offense requiring a lifetime sentence. The enormous consequences and legal complexities associated with sexual assault cases, and lifetime sentencing, have generated more litigation in district court and, as a result, longer and more complex appeals. Further, because of the severe consequences of the lifetime sentencing scheme, probation revocations in felony sexual assault cases are also often more heavily litigated than in the past, which again translates into longer records on appeal.
- Counts. More counts are being filed per case as a result of more aggressive prosecution by the DA. In FY 1999-2000, among all case types, the average number of counts filed by a prosecutor in cases closed that year was 2.8. In FY 2011-12, this average climbed to 3.0 counts per case. More counts filed per case often result in a longer and more complex trial court record to be reviewed by the Division.

Once the Opening Brief is filed, the work shifts to the Attorney General's office. That office reviews the Opening Brief and the necessary portions of the appellate record and prepares an Answer Brief. The Answer Brief is generally limited to researching and responding to only the specific arguments raised in the Opening Brief and, therefore, the preparation of the Answer Brief is somewhat less time-intensive than preparation of the Opening Brief.

After receiving the Answer Brief, attorneys in the Division must review the Answer Brief, and often review portions of the record and conduct additional research, in determining whether to write and file a Reply Brief. Even if no Reply Brief is ultimately filed, this step can take

significant time for evaluation and, of course, if a Reply Brief is filed then more time is involved.

Since approximately 90% of criminal cases are affirmed on appeal, the Division is often in the position of receiving an adverse ruling from the Court of Appeals. At that point, Division attorneys must determine whether to file a Petition for Rehearing with the Court of Appeals and/or a Petition for Writ of Certiorari with the Colorado Supreme Court. Thus, a single felony appeal frequently requires attorneys in the Division to draft at least three separate substantive pleadings – an Opening Brief, a Reply Brief, and a Petition for Writ of Certiorari – and in some cases more pleadings are required. For example, if the Supreme Court decides to review a case, then both the Division attorney and the Attorney General's office engage in further substantive briefing and oral arguments in the case.

In addition, since Division attorneys represent individual clients, the attorneys' ethical and professional obligations require adequate communication with their clients. In many cases, depending upon the nature of the case and client, this can consume a substantial amount of attorney time. Further, since many of the Division's clients are incarcerated in the Department of Corrections and can be located anywhere in the State, attorneys in the Division must frequently arrange visits in facilities that are several hours away from the Division's offices in Denver.

Thus, although much of the time and work within the appellate process is spent in the preparation of the Opening Brief, a significant amount of additional resources are typically necessary to bring the case to its final disposition. This process may take years and often includes some or all of the following, in addition to the Opening Brief: a Reply Brief, Oral Argument(s), Petition for Rehearing, Petition for Writ of Certiorari, any briefing in the Colorado Supreme Court on discretionary review, and any subsequent filing of a Motion for Reconsideration of Sentence Pursuant to Crim.P.35(b).

Caseload and Backlog

From FY 1999-2000 through FY 2009-2010, the Division experienced an increase in the number of new cases received at an annual rate of 3.8 percent, equal to almost three times the rate of population growth. This rapid rate of growth occurred despite the Division managing to maintain an annual growth rate in its appellate case closings of 2.9 percent. However, since FY 2010-2011, new cases assigned have remained at an average of 597 new cases per year.

Total appellate cases include both new cases opened in the current fiscal year, plus cases opened in prior years and carried into the new current year which are awaiting the filing of the Opening Brief. The National Legal Aid and Defender Association ("NLADA") accepted performance standards call for a caseload for each full-time appellate attorney of 22 work units per year, based on 1 work unit per brief in a case in which the transcripts are 500 pages or less. While in FY 1999-2000, the average size of a record on appeal in the Division was more closely aligned with this standard (roughly 650-700 pages), the average appellate case size in the Division has now reached approximately 1,250 pages. Thus, application of the NLADA standards for the current 35.8 FTE assigned to the division would result in the division managing approximately 315 cases per year. In FY 2012-2013, the division filed briefs in 427 cases and closed 562 total cases, well

in excess of NLADA standards.

Currently, appellate attorneys carry on average well over 40 cases annually. In addition, the Division is carrying three announced and/or potential capital punishment cases which draw substantial resources away from its caseload. Even as the Division's attorneys are carrying a caseload significantly higher than accepted national standards, the backlog of cases has continued to grow from 369 cases at the end of FY 1999-2000 to 671 this year, and is clearly unsustainable over the long-term.

The extent to which The Division's attorneys cannot meet caseload demands has a direct impact on the ability of the appellate courts to maintain effective processing of its cases. Because of the backlog of cases as well as the continuing influx of new cases, the deadlines for filing Opening Briefs in many appellate cases handled by the Division must be extended for significant periods of time to allow the attorney handling the case to process other, older cases before an Opening Brief can be filed in the remaining cases in the attorney's backlog. It is not uncommon for cases to be delayed for more than a year. As described more fully in the Consequences section, this level of existing backlog and number of new cases received each year threatens costly litigation around dismissed appeals and/or claims of ineffective assistance of counsel.

Current Staffing and Resource Requirements

In FY 1999-2000, the Division had approximately 25 attorneys handling full appellate caseloads and carried a backlog from previous years of 269 cases pending filing of an Opening Brief in addition to 487 new cases received that year. Each year since, the division's caseload has increased, gradually reaching a level of 693 cases at the end of FY 2008. At that time, the Public Defender diverted approximately \$500,000 of its personal services funds to contract out 82 of its most significant cases existing within its backlog. The work done by these contractors reduced the caseload to 611 cases. Since then, the number has grown to 671 at the end of FY 2012-13. This number exceeds the NLADA standard caseload of 315 for the division by 356 cases.

The Division is currently staffed at 35.8 attorney FTE and for FY 2013-14, is expected to carry a caseload of 671 cases from previous years as well as receive 597 new cases. With current resources, the division will not be able to close the 671 cases, let alone make in-roads into the 597 projected new cases. If additional resources are not allocated to the Division, this backlog will continue to climb at an alarming rate. See details in TABLE 1, below.

TABLE 1
OSPD Appellate Division Caseload – Current Resources
FY 1999-00 to FY 2018-19

	Total Atty FTE	New Cases	Briefs Filed by PD	Cases Resolved Other Ways	Total Cases Closed	Cases awaiting filing of initial brief	Standard Caseload per NLADA	'Backlog' Cases in excess of NLADA standards	Increase in Backlog
FY 00	25	487			387	369	325	44	100
FY 08	29	606	465	121	586	611	373	238	20
FY 09*	31.8	627	450	205	655	583	331	252	14
FY 10	31.8	602	427	124	551	634	331	303	51
FY 11	34.8	575	415	142	557	652	331	321	18
FY 12	34.8	589	460	133	593	648	331	317	-4
FY 13	34.8	585	427	135	562	671	315	356	39
FY 14 Est.	35.8	597	440	131	571	697	315	382	26
FY 15 Est.	35.8	597	440	131	571	723	315	408	26
FY 16 Est.	35.8	597	440	131	571	749	315	434	26
FY 17 Est.	35.8	597	440	131	571	775	315	460	26
FY 18 Est.	35.8	597	440	131	571	801	315	486	26
FY 19 Est.	35.8	597	440	131	571	827	315	512	26

Assumptions:

*No projected increase in the number of new cases since the number has remained constant.
Cases Resolved Other Ways include withdrawals/dismissals and average 22% of new cases
over the past 5 years.*

**In FY09 - Cases Resolved Other Ways includes 80 briefs filed by contracted attorneys.
The # of briefs filed per attorney for FY 2013-14 is projected using prior years actual.*

If the Decision Item is approved, it is projected that the additional staff will allow the Division to reduce its caseload over the next five years by approximately 72 cases each year as outlined in TABLE 2.

TABLE 2
OSPD Appellate Division Caseload – Impact with Requested Resources
FY 1999-00 to FY 2018-19

	Total Atty FTE	New Cases	Briefs Filed by PD	Cases Resolved Other Ways	Total Cases Closed	Cases awaiting filing of initial brief	Standard Caseload per NLADA	'Backlog' Cases in excess of NLADA standards	Increase in Backlog
FY 00	25	487			387	369	325	44	100
FY 08	29	606	465	121	586	611	373	238	20
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FY 12	34.8	589	460	133	593	648	331	317	-4
FY 13	34.8	585	427	135	562	671	315	356	39
FY 14 Est	35.8	597	440	131	571	697	315	382	26
FY 15 Est. (Adds 8 Atty FTE)	43.8	597	538	131	669	624	315	310	-72
FY 16 Est.	43.8	597	538	131	669	552	315	237	-72
FY 17 Est.	43.8	597	538	131	669	480	315	165	-72
FY 18 Est.	43.8	597	538	131	669	407	315	92	-72
FY 19 Est.	43.8	597	538	131	669	335	315	20	-72

Assumptions:

No projected increase in the number of new cases since the number has remained constant. Cases Resolved Other Ways include withdrawals/dismissals and average 22% of new cases over the past 5 years.

**In FY09 - Cases Resolved Other Ways includes 80 briefs filed by contracted attorneys. The # of briefs filed per attorney for FY 2013-14 is projected using prior years actual.*

Impact of Attorney General's Additional Staff

Last year the AG's office requested and received six attorney positions beginning July 1, 2013 to reduce their growing appeal backlog of Answer Briefs. Since the Court of Appeals does not grant lengthy extensions on Reply Briefs (the pleading the Division files in response to the AG's Answer Brief), when an attorney receives an Answer Brief, he or she must stop working on Opening Briefs in other cases and immediately evaluate the need for a Reply Brief, including researching arguments and authorities raised by the AG and communicating with the client. This work must be done even if the attorney ultimately determines that no Reply Brief will be filed. If a Reply Brief is to be filed, the attorney will then prepare it.

The expected increase in the number of Answer Briefs resulting from the additional AG staff mean that it will take longer to get back to producing Opening Briefs and, as a result, the Division's backlog will likely grow. While this is hard to quantify, it was estimated by the AG's

office that approximately 80 of the Public Defender cases would be completed on a faster timetable. Because, roughly speaking, a Reply Brief equates to .25 workload of the opening brief, these 80 cases would require an additional 20 work credits which is the equivalent of 1 FTE.

Consolidation of Appeals within the Division

Currently, the Appellate Division processes felony appeals while the Public Defender regional trial offices handle all county court and juvenile appeals. Due to lack of resources and the caseload overload experienced at the trial level, appeals may not be filed in all situations when warranted or worked on only as time permits, resulting in an inefficient process and unmet client needs.

The consolidation of the county court and juvenile appeals to the Division, with its expertise in handling appeals, would streamline the appeal process and would also provide a training opportunity for attorneys to transition into the felony appellate process. Having a county court position would allow entry-level attorneys, inexperienced at handling felony appeals, to start with county court cases to gain the necessary experience to move into felony cases when ready. This will provide for more efficiencies and time utilization when attorneys transition to the felony level. The Division would also be able to have a dedicated juvenile appellate attorney to provide the expertise required for representing juveniles at the appellate level.

Over the past couple of years, the trial offices have closed an average of 150 county and juvenile appeals per year. The Office estimates that the workload on these cases equates to approximately .3 of a felony appeal. Based on the NLADA standards, that would require 2.0 attorney FTE if these cases are handled by the Division.

Anticipated Outcomes

The Office anticipates that the additional FTE and funding requested will allow the agency to reduce its backlog and caseload over the next five years to a more manageable level in accordance with NLADA standards. Once this goal is reached, further analysis can be provided that may allow for a reduction in FTE, while maintaining the required resources for the Division to more efficiently and effectively meet its constitutional mandate.

Consequences if Not Funded

On November 29, 2012, the Chief Deputy Clerk of Court informed the Public Defender's Office, the Attorney General's Office, and the Office of Alternate Defense Counsel that Court of Appeals Chief Judge Janice Davidson was unwilling to grant extensions of time that exceed 540 days for Opening and Answer Briefs and would instead issue orders in such cases granting only 28 days to complete the briefs. Any requests to reconsider such orders would be referred to a three-judge motions panel. The Public Defender's Office, the Attorney General's Office, and the Office of Alternate Defense Counsel requested to immediately meet with the Chief Judge to discuss

potential impacts to their agencies, but a meeting was unable to be held until February 2013, after the policy had been implemented. At the time of the adoption of the new policy, the Division had approximately 60 cases where the Opening Brief due date had been extended 600 or more days.

On July 1, 2013, the Court of Appeals dismissed an appeal in *People v. Rodney Eddy*, Case No. 10CA2492, a case handled by the Division. The Court's dismissal order stated that "[b]ased on the significant two years of extensions previously granted, this Court's statement in its prior order that no further extensions would be given, and the lack of sufficient good cause, the Court is not persuaded that further extensions are warranted." The Division immediately requested that the Court of Appeals reconsider the dismissal order, arguing that it had established good cause for the extension requests. The Public Defender informed the Court that both the Division and the Attorney General's Office had discussions with Joint Budget Committee staff about the need to reduce appellate backlogs in both the Office of the Public Defender and the Attorney General's Office and that the Division would be a priority for the Public Defender's Office in the upcoming legislative session.

The Attorney General's Office and the Office of the Alternate Defense Counsel supported the Public Defender's request to reinstate Mr. Eddy's appeal since dismissals of criminal appeals, which would result in claims of ineffective assistance of counsel against the Division, have obvious impacts on their agencies and interests. In light of this, as well as the progress the Division had made in reducing its backlog of oldest cases, and with the understanding that the Public Defender's Office would make Appellate Division staffing and resources a priority in this legislative session, the Court of Appeals reinstated Mr. Eddy's appeal on August 8, 2013.

Both the former and current Chief Judge of the Court of Appeals have expressed support for the Public Defender's legislative request for additional resources to reduce the backlog and accompanying appellate delay. Indeed, given the dismissal of Mr. Eddy's case, it is imperative that the agency receive these resources to be able to further reduce appellate delay. Without additional resources, more dismissals - or even the Division's withdrawal from some appeals - are likely to occur.

In addition to this policy on Opening Briefs, the Court of Appeals has also determined that Reply Briefs filed by the Division in response to the Attorney General's Answer Briefs would be granted no more than 49 days of extension. The combination of no-further extension orders on both Opening Briefs and Reply Briefs mean that attorneys sometimes face multiple orders to file pleadings with no further extensions allowed. Coupled with the anticipated increase in Answer Briefs resulting from the additional AG attorney positions, the Court's deadline policies place pressure on the Division to produce more, faster, without additional resources.

In sum, if this request is not funded, the amount of time it takes to bring an appellate case handled by the Division to full resolution will continue to grow, reducing our ability to provide effective and timely representation of our clients, and causing our office to be even further out of compliance with the Court's new policy regarding extensions of time for filing Opening and Answer Briefs. The number of additional cases added to the already existing backlog will continue to escalate at an ever-increasing rate, the time required to file an Opening Brief will continue to increase, and individual attorney's caseloads will become even further out of

compliance with NLADA caseload standards, thus exposing the Office and the Division attorneys to potential lawsuits or claims of ineffective assistance of counsel.

Impact to Other State Government Agencies

Additional attorneys in the Division will result in Opening Briefs being filed more quickly and the Attorney General will need to respond to those briefs. It is difficult to quantify the impact to their agency.

If the Office does not receive the funding and additional appeals are dismissed or the Division determines that it must move to withdraw from cases to avoid dismissals, work and costs will shift to the Office of Alternate Defense Counsel to litigate claims of ineffective assistance of counsel against the Division in district court and then represent the clients in their appeals as well.

It is the Offices understanding that the Court of Appeals is essentially “caught up” on its own caseload and will be able to handle faster processing of briefs in criminal appeals if the Division is afforded additional resources. If the Office does not receive the funding and additional appeals are dismissed, the district courts will have additional work hearing claims of ineffective assistance of counsel against the Division.